In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1550

VINCENT ALO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the subsequent confirmation of a fact which was assumed *arguendo* by the court of appeals on his direct appeal—the existence of a prior sealed indictment against him—constitutes newly discovered evidence showing that he was denied a speedy trial.

1. After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of obstructing an investigation by the Securities and Exchange Commission by giving false testimony, in violation of 18 U.S.C. 1505. He was sentenced to imprisonment for five years and to pay fines aggregating $10,000. The court of appeals affirmed. *United States* v. *Alo,* 439 F. 2d 751 (C.A. 2), certiorari denied, 404 U.S. 850. Petitioner thereafter moved to

vacate the judgment of conviction or alternatively for a new trial, on the ground that newly discovered evidence established that he had been denied his right to a speedy trial (Pet. App. C2-C3). This motion was denied by the district court (Pet. App. C10). The court of appeals affirmed without opinion and denied petitions for rehearing (Pet. App. A1-A2).

On direct appeal of his conviction, petitioner contended that he had been deprived of his Sixth Amendment right to a speedy trial because the 1969 indictment, upon which he was tried, merely supplanted a substantially identical sealed indictment returned in 1966. While the government did not at that time concede the existence of the prior indictment, it did not deny its existence. Both parties argued the case on the assumption that such an indictment was returned, and the court of appeals decided the case upon that assumption. The court pointed out that, although the government offered no excuse for this delay, the 1966 indictment had been sealed, petitioner had suffered neither pretrial detention nor personal anxiety and public obloquy, the circumstances made it clear that the delay did not hamper petitioner's capacity to present his defense, and there was not even the credible possibility of prejudice. *United States* v. *Alo,* 439 F. 2d 751, 754-756, certiorari denied, 404 U.S. 850.

Petitioner's present contentions are based largely upon a Department of Justice memorandum produced by the government after his direct appeal in response to a motion by petitioner. The memorandum confirmed the existence of the 1966 sealed indictment. According to the memorandum, the reason for the sealing of the indictment was that on the same day it was returned a related indictment was returned against Alvin Malnik, a Miami attorney, who had been the subject of electronic

surveillance. The United States Attorney had "expressed great concern over the disclosure of these logs because he did not want to spread on the record that the Department had engaged in electronic surveillance of a member of the bar." The memorandum further states that the Assistant United States Attorney later proposed to dismiss the Malnik indictment and to open the Alo indictment in order to proceed with his prosecution (Pet. App. C4-C5) since Alo was not the subject of surveillance, there was no indication that he was overheard and the case against him rested upon the independent sources. The memorandum further showed that the electronic surveillance of Malnik had occurred from July 5, 1963, to September 17, 1963; that the SEC had commenced its investigation on November 27, 1964, and that petitioner's false testimony had not been given until 1966 (Pet. App. C5).

In denying the instant motion, the district court found that the primary reason for the delay in prosecuting petitioner was the government's reluctance to disclose the surveillance of attorney Malnik; that another reason for the delay was an investigation to determine whether a corrupt SEC official was leaking information to petitioner; that the government was not in possession of any recorded statements which were the product of the Malnik surveillance; and that the government had investigated further and found no indication that petitioner was at any time overheard (Pet. App. C6-C7).

The district court concluded that the surveillance, which terminated in September 1963, could not have provided exculpatory evidence concerning defendant's false statements in 1966 and, as the court of appeals had previously found (439 F. 2d at 756), there was not

even the credible possibility of prejudice to the petitioner because of the pretrial delay. While the court expressed disapproval of the govenment's failure to disclose at the appropriate time its suppression of the 1966 indictment and its reasons for doing so, the court found that the delay "was designed neither to harass defendant nor to impede his defense" and did not prejudice or otherwise adversely affect him in any way or deprive him of his right to a speedy trial (Pet. App. C8-C10). The court of appeals affirmed this finding (Pet. App. A1).

2. Upon direct appeal of the conviction, the court below assumed the existence of the prior indictment, considered the case as one in which the government had offered no justification for the delay, and found no prejudice to petitioner. Petitioner is essentially seeking to relitigate this issue. We submit that it was correctly decided and does not warrant further review.

This Court has adopted a balancing approach for the decision of speedy trial issues. The principal factors considered are length of delay, reason for delay, the accused's assertion of his right, and the prejudice accruing to him. *Barker* v. *Wingo*, 407 U.S. 514, 522, 530. The Court stated as to the last of these (407 U.S. at 532):

> A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his

> case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

See also *United States* v. *Ewell,* 383 U.S. 116.

Petitioner, who has consistently been unable to make a showing of prejudice of any kind, claims that the lack of demonstrable prejudice is overbalanced by the alleged misconduct of the government in sealing the 1966 indictment and not revealing its reasons for so doing. As the trial court found, however, there was nothing to indicate a desire on the part of the government to oppress or harass petitioner and the government's action did not in fact adversely affect petitioner. The courts below properly balanced the reasons for the delay with the other factors at issue and in light of the total absence of prejudice to the petitioner correctly concluded a second time that he was not denied his right to a speedy trial. There is no reason for further review by this Court.

3. Petitioner also argues that in the circumstances of this case, the burden should be upon the government to show lack of prejudice. He seeks in this way to escape the fact that he has been unable to show any prejudice whatsoever. But, as this Court stated in *Barker* v. *Wingo,* the advantages of delay often accrue to the defendant in the trial of a criminal case, inasmuch as the government has the burden of proving guilt beyond a reasonable doubt. 407 U.S. at 521. And, contrary to petitioner's contention that "specific proof of prejudice frequently entails the virtually impossible task of proving a negative pro-

position" (Pet. 20), such proof is normally of a very positive nature. See, *e.g.*, *Dickey* v. *Florida*, 398 U.S. 30, 38. To require the government to prove the absence of prejudice when the petitioner can show none would truly be to require the proof of a negative.

4. Finally, petitioner in a Supplemental Brief erroneously seeks to rely upon *Strunk* v. *United States*, No. 72-5521, decided June 11, 1973. In that case, the court of appeals held that the inadequately explained delay in bringing the defendant to trial, while not prejudicing him in the preparation of his defense, did prejudice him in the serving of his sentence by the number of days involved in the delay, because the sentence was to be concurrent with a previously imposed sentence in an unconnected case. Limited relief was accordingly afforded by reducing the sentence. This Court held, however, that since the court of appeals had determined that the right to a speedy trial had been denied and there was no appeal from that determination, the question whether there was in fact a denial of that right was no longer at issue and the court specifically did not rule on that question. The Court held that where a denial of the right to a speedy trial has been shown the remedy must be by dismissal of the indictment. Thus, neither the court of appeals nor this Court indicated in *Struck* that it would find a denial of the right to a speedy trial where, as here, no prejudice of any kind has been shown.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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